

LAND USE COMMISSION
MEETING MINUTES

October 22, 2010

Waikoloa Beach Marriott Resort
Naupaka Rooms V, VI, and VII
69-275 Waikoloa Beach Drive
Waikoloa, Hawai`i 96738

COMMISSIONERS PRESENT:

Vladimir Devens
Kyle Chock
Duane Kanuha
Ronald Heller
Normand Lezy
Charles Jencks
Lisa Judge

COMMISSIONERS EXCUSED:

Nicholas Teves, Jr.
Thomas Contrades

STAFF PRESENT:

Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney General
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Acting Chief Clerk

COURT REPORTER:

Holly Hackett

AUDIO TECHNICIANS:

Hotai Zerba

CALL TO ORDER

Chair Devens called the meeting to order at 9:10 a.m

ACTION

A10- 788 HHFDC/Forest City Hawaii, Kona LLC

Chair Devens announced that this was a continued hearing to consider the Petition to amend Land Use District Boundary Amendment Docket No. A10-788.

APPEARANCES

Steven Lim, Esq., and Jennifer Benck, Esq., represented Forest City Hawaii Kona LLC
Craig Iha, Esq., represented Hawaii Housing Finance and Development
Corp., (“HHFDC”)

Laureen Martin, Esq., represented Hawaii County Department of Planning
Bobbie-Jean Leithead-Todd, Director, Hawaii County Department of Planning

Bryan Yee, Esq., represented State Office of Planning (“OP”)

Abe Mitsuda, State Office of Planning

Mary Alice Evans, State Office of Planning

Benjamin Kudo, Esq., represented Queen Lili’uokalani Trust (“QLT”)

Yuko Funaki, Esq., represented Queen Lili’uokalani Trust

PETITIONER’S WITNESSES (continued)

Randy Okaneku (recalled from appearance as witness #11 on October 21, 2010)

Mr. Lim recognized that Mr. Okaneku was technically on cross-examination by QLT and requested Mr. Okaneku to summarize his statement and submit the written testimony in addition as a supplement. Discussion ensued to determine whether this suggested format was acceptable to the Parties. Mr. Kudo agreed to hold off on his cross-examination.

There were no objections to the suggested procedure.

Mr. Okaneku reported on his findings regarding the inconsistencies and errors asserted to be contained in his report by QLT and stated that the inconsistencies did not affect his basic conclusions and described the Level of Service anticipated by implementing the mitigation measures suggested in his report; and agreed that his traffic report conclusions and the proposed Petitioner Condition No. 4 regarding mitigation measures addressed the traffic impacts of the proposed Project. Mr. Okaneku confirmed that the DOT and the Public Works Department of Hawaii’s reviewing agencies accepted the assumptions, conclusions and mitigation measures of the traffic report.

Ms. Martin and Mr. Yee had no questions. Mr. Kudo reserved his cross-examination till after copies of his documents were received by the Commission.

Commissioner Heller requested clarification on the methodology used in handling data in the study. Mr. Okaneku described how he made adjustments with data used for his studies, including reliance on historical data.

Chair Devens inquired about the usefulness of historical data and how it was used when traffic conditions seem to get worse over time. Mr. Okaneku shared how he had evaluated and used historical data for his research.

Commissioner Kanuha requested clarification on the margin of error used in the findings and whether it was acceptable or not. Mr. Okaneku provided that as a rule of thumb, a 5 percent difference was a significant difference.

Commissioner Jencks requested clarification on pro-rata share or fair-share allocation of costs and DOT's inability to accept funds. Discussion ensued on whether it would be better to make the improvements up front rather than attempt a settlement with the State. Mr. Okaneku responded that the TIAR contained a list of mitigation measures that had been expanded to include construction costs to determine what the proposed Project's share would be and that plans included costs for the developer to build mitigation measures with a fair-share allocation cost system.

Mr. Lim requested clarification on the assumptions made in the model for the proposed Project. Mr. Okaneku replied that they were trying to minimize the number of assumptions made and described the measures that were used to qualify the assumptions that were made.

There were no further questions for Mr. Okaneku. Chair Devens confirmed that Mr. Okaneku would be available for Mr. Kudo to finish his cross-examination and discussion ensued regarding introduction of Petitioner's Exhibit 110.

There were no objections to admitting Petitioner's Exhibit 110.

14. Race Randle- Forest City Development Manager

Mr. Randle described how his company had participated in planning and preparing for developing the proposed Project. Mr. Randle stated that Forest City was not seeking any 201H exemptions from the Commission and described the arrangements that had been made for the Project with the DOE, OP, Hawaii County, affordable housing, neighboring properties, the community.

Mr. Randle expressed that although there had been outreach efforts to QLT, he was not aware of what QLT plans were and represented that Forest City would fulfill and implement the mitigation measures as indicated on Petitioner's Exhibit No. 78, Governor Lingle's acceptance memorandum on the EIS or as indicated by the modified notes.

Ms. Martin requested clarification on whether Forest City was not requesting 201H exemptions. Mr. Randle replied that no 201H exemptions were being sought from the State, but rather from the County.

Mr. Yee requested clarification on whether Forest City was prepared to agree to Petitioner's Exhibit 17- Proposed Findings of Fact, Conclusions of Law and Decision and Order and reviewed various Conditions that had been agreed upon. Mr. Randle confirmed the Conditions that were agreed to and added that he had been meeting with the DOT since about December 2009 and would continue the discussions and negotiations in good faith and diligent manner to comply with DOT requests.

Mr. Kudo requested clarification on the development agreement between Forest City and HHFDC and the provisions for affordable housing, and project financing arrangements.

Mr. Kudo requested clarification on the exemptions that Forest City was seeking from Hawaii County. Mr. Randle responded with his understanding of what the number of exemptions were, how they had been determined and what they included.

Ms. Benck requested clarification on what the roles the Commission and Petitioner would be for Condition No. 23 and the Order to Show Cause. Mr. Randle provided his understanding of what the Petitioner and Land Use Commission responsibilities would be.

Mr. Yee requested clarification on the cash contribution that Forest City would be making and if it could be used to offset any purchase that the DOE may make for additional lands. Mr. Randle stated the cash contribution amount and indicated that the DOE could use the funds to purchase additional lands.

Chair Devens inquired whether Mr. Randle understood that the Commission was required pursuant to its administrative rules to issue an Order to Show Cause if it suspected or had reason to believe that there had been a failure to perform under the conditions imposed. Mr. Randle confirmed that he did.

Discussion ensued regarding a clause in the development agreement which allowed Forest City to cancel at any time at its discretion.

Mr. Lim presented Petitioner's Exhibit 110 to be added for Mr. Okaneku's testimony. Discussion ensued to determine scheduling to allow Mr. Kudo time to review the document. It was determined that OP's witnesses would be next and Ms. Leithead-Todd would then appear out of the scheduled order.

There were no objections to the witness scheduling adjustments.

OP WITNESSES

1. Ed Sniffen- Department of Transportation Highways Administrator

Mr. Sniffen noted that the DOT had been working with Petition to get an agreeable TIAR in order to fairly mitigate any impacts on the state highway facilities and described the current status of negotiations with the Petitioner.

Mr. Lim requested clarification on how the proposed Project was being processed. Mr. Sniffen responded that no special treatment or lower standards were being applied and described how the DOT handled fair share arrangements.

Ms. Martin requested clarification on what "fair share" included. Mr. Sniffen responded with his perception of what "fair share" included and stated that his staff had been working with the county on this matter.

Mr. Kudo requested clarification on portions of Mr. Sniffen's written testimony. Mr. Sniffen explained comments contained in his testimony and discussion ensued regarding the different methodologies used in the TIAR for the proposed Project.

Mr. Sniffen recognized the discrepancies that QLT had discovered and acknowledged the difficulties of imposing a condition upon the Petitioner without a Memorandum of Understanding or a Memorandum of Agreement to refer to.

Chair Devens inquired if it was unusual to find inconsistencies or discrepancies in the initial review of a draft TIAR and whether Intervenor's Exhibit 16's contained more than what may be considered the norm. Mr. Sniffen responded that it was not unusual to find irregularities and explained the review process that TIARs were subjected to.

Commissioner Jencks requested clarification of when additional reviews and changes to the parameters for improvements could be made during the negotiation process. Mr. Sniffen provided his understanding of how negotiations were conducted and what different terms could be included in agreements.

There were no further questions for Mr. Sniffen.

2. Mary Alice Evans

Ms. Evans stated that she was testifying on behalf of Abbey Seth Mayer, the Director of the Office of Planning, that OP would be standing by its written testimony, and expressed additional reasons why OP supported the Petition with the recommended conditions.

Mr. Lim requested clarification on whether or not Petitioner had agreed to stipulate with OP's recommended conditions of approval 1-28 with the exception of Condition 23-Automatic Order to Show Cause. Ms. Evans confirmed that OP and Petitioner were in agreement except for Condition 23.

Ms. Martin and Mr. Kudo had no questions.

Commissioner Kanuha requested clarification on whether OP recognized and considered the duplications of Commission conditions and county requirements. Ms. Evans responded that OP did review state concerns and provided the reasons why state and county concerns overlap. Discussion ensued over the concerns about jurisdictional overlapping condition requirements and county exemptions and what considerations OP should make in those situations.

Chair Devens shared his perception of what the LUC's legal obligation was and requested clarification on what concerns the Petitioner had raised with OP regarding having the Automatic Order to Show Cause included in the Decision and Order. Ms. Evans indicated that Petitioner preferred to use the word "may" rather than "shall". Chair Devens recalled earlier testimony that described how using "shall" could impact a developer's ability to obtain financing for a project and was a genuine concern for them. Ms. Evans acknowledged that it could be a very important concern.

There were no further questions for Ms. Evans.

Chair Devens inquired if QLT would have enough time during the planned recess to review the additional exhibit from Petitioner. Mr. Kudo acknowledged that QLT had sufficient time.

The Commission went into recess at 12:15 and reconvened at 1:30 p.m.

Mr. Yee confirmed that OP had presented all of its witnesses and that its case in chief was finished.

Hawaii County

1. Bobby Jean Leithead-Todd- Hawaii County Planning Director

Ms. Leithead-Todd described her credentials and indicated that the correct reference cited on page 14 of the submitted written testimony should be to section 25-2-46 of Hawai'i County Code. Ms. Leithead-Todd described the various aspects of the proposed Project that she was familiar with and provided the current status of the County related activities surrounding it.

Mr. Lim and Mr. Yee had no questions.

Mr. Kudo requested clarification on Mr. Scanga's testimony regarding exemptions that Forest City had requested. Ms. Leithead-Todd described the different methods of requesting County exemptions and provided her estimate of the value of the County fees requested to be waived and reported on other issues that Hawaii County was still working on.

Commissioner Kanuha requested clarification on the County's position on OP Exhibit 2. Ms. Leithead-Todd recalled that Hawaii County did not have any opposition to OP's proposed Conditions and represented that County was still working with Petitioner on some of their proposed conditions.

Commissioner Judge requested clarification on how exemptions were obtained. Ms. Leithead-Todd provided her perception of exemption requirements and explained how her department processed exemption requests and applied them as necessary to the proposed 201H Project.

Commissioner Jencks requested clarification on whether any of the exemptions would limit the dedication of certain infrastructure items. Ms. Leithead-Todd described the various items that the County would accept via dedication.

Commissioner Lezy excused himself at 1:50 p.m. and returned at 1:55 p.m.

Commissioner Jencks requested clarification on the County's position regarding allocation of percentages for affordable housing. Ms. Leithead-Todd shared that the County did not have a formula and described what her preferences for the allocation of affordable housing would be and how the energy efficiencies of the proposed units assisted in making them more affordable. Ms. Leithead-Todd also explained the County level activities that would be occurring to facilitate the proposed Project.

Commissioner Judge requested clarification on the status of proposed plans for reclaimed water and the use of stimulus funds. Ms. Leithead-Todd stated that she was unaware of whether any stimulus funds were available and described Hawaii County's plans for upgrading the Kealakehe Wastewater Treatment Plant for current and future needs.

Chair Devens inquired if Mr. Randle's breakdown of exemptions was accurate. Ms. Leithead-Todd responded that she agreed with Mr. Randle's characterization.

Mr. Kudo requested clarification on what the Commission could do to assist the County in its situation. Ms. Leithead-Todd identified a Condition regarding regional mitigations that needed to be met (requiring the approval of the Hawaii County Department of Public Works) that she felt would address any of the county concerns.

There were no further questions for Ms. Leithead-Todd.

Mr. Lim stated that he would recall Randy Okaneku and would hold his rebuttal witness in reserve after the conclusion of the other Parties' cases. Discussion ensued to determine what stipulations between Petitioner and QLT had been agreed to regarding the base data contained in the appendix and the tables in the traffic reports referenced in QLT Exhibit 36.

PETITIONER'S WITNESSES (continued)

Randy Okaneku (recalled from appearance as witness #11 on October 21, 2010 and earlier on October 22, 2010)

Mr. Kudo requested clarification on Mr. Okaneku's response to QLT's Exhibit 36 and the discoveries that QLT had made within the traffic report. Mr. Okaneku provided his perspective of why the report models differed and disclosed the source of his information and the methodology used in his report to arrive at his findings.

Mr. Lim requested clarification on whether QLT's findings changed the recommendations included in the traffic reports for mitigation measures. Mr. Okaneku maintained that he felt that his recommendations for mitigation measures would result in maintaining the minimum Level of Service or better in the Petition Area.

There were no further questions for Mr. Okaneku. Mr. Lim reserved the right to call potential rebuttal witnesses.

QLT WITNESSES

1. Dennis Kauahi – Queen Lili`uokalani Children's Center

Mr. Kauahi shared the history, background and operational challenges of the Trust and described the various activities and services that QLT performed and provided within the community.

There were no questions for Mr. Kauahi.

The Commission went into recess at 2:45 p.m. and reconvened at 2:57 p.m.

2. Tanya Malia Souza- QLT Archaeologist

Ms. Souza described her responsibilities with QLT and recalled her archaeological surveys and findings in the region; and shared her recommended mitigation measures for preserving and monitoring them.

Mr. Lim requested clarification on what areas were covered by the 1990 Archaeological Inventory Survey (AIS) and subsequent surveys. Ms. Souza used QLT Exhibit 2 to identify the surveyed areas.

Ms. Martin had no questions.

Mr. Yee requested clarification on how Ms. Souza felt the suggested recommendations should be handled by State agencies. Ms. Souza expressed her opinion on what kind of action was necessary .

Chair Devens inquired if Ms. Souza's recommendations had been conveyed to the Petitioner and if so, what the response was. Ms. Souza replied that she had not conveyed them to the Petitioner and that her recommendations were made as an archaeologist and not as a QLT employee; and that she had no plans to pass on her information.

There were no further questions for Ms. Souza.

Discussion ensued to determine the number of remaining QLT witnesses. Mr. Kudo confirmed that he had two remaining witnesses.

Chair Devens adjourned the meeting at 3:30 p.m.